

VIPNA

Video Information Providers for Non-discriminatory Access

MAR 13 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

March 13, 1996

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Mr. William F. Caton
Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, DC 20554

Re: Ex Parte Presentation in MM Docket 92-266

Dear Mr. Caton:

Pursuant to 47 C.F.R. § 1.1206, VIPNA (Video Information Providers for Non-discriminatory Access), submits this original and one copy of a letter disclosing an oral ex parte presentation in the above-captioned proceeding.

On March 13, 1996, the undersigned met on behalf of VIPNA with Jackie Chorney, Lisa Smith, Susan Ness, Mary McManus, Rachelle Chong and Suzanne Toller. The meetings dealt with the reconsideration of the commercial leased access rules. On this date, copies of the attached written documents were sent to the FCC attendees at the meeting.

Yours truly,



Karen M. Director

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P.O. Box 4591
Chico, CA 95927
916.891.8410
Fax.891.8443

MAR 13 1996**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY****What's Wrong with Leased Access**

Congress did not intend for leased access to maximize cable operators' profits when leasing. Leased access is simply mandated by Congress, just as franchising authorities mandate PEG access, without compensation for "lost opportunity." The law doesn't guarantee that cable operators will receive profits equivalent to those received for programming on standard carriage channels.

The Commission has interpreted the "no adverse affect" provision of the 1992 Cable Act (Sec. 612 (c)(1)) too far in favor of cable operators, at the expense of the public, without hard evidence that cable operators will cease to operate. Cable operators are paid for a channel whether it is programmed or not.

The "implicit fee" rate does not reflect an accurate cost of providing carriage. Since the underlying cost of the system is already covered by subscriber fees, the cable operator only needs to cover its cost of accommodating an unaffiliated programmer. These costs could be administrative (writing contracts, checking credit worthiness, notifying subscribers of programming changes) or technical (providing a playback deck or access to the headend). It is the operator's discretion to select what programming (if any) it will remove to make room for leased access. This might be a single half-hour program or a whole channel. One could reasonably assume that a cable operator would displace its least profitable programming, thereby minimizing any lost advertising revenue. Lower leased access rates will not cause migration of standard carriage programmers because those programmers do not pay for carriage.

How to Make a Cost-based System Work

As proven by many leased access complaints, when a cable operator is allowed to proactively offer rates or services to a programmer it does not want to carry, it simply delays providing those rates or services. The Commission cannot rely on cable operators to negotiate with lessees for reasonable rates, terms and conditions. Review complaints filed over the preceding two years for ample proof of cable operators' anticompetitive practices.

In any cost-based system of rates, the Commission should set the maximum at a nominal amount, then allow operators to prove a higher cost. Without the benefit of adversarial interpretations as in most legal depositions, critical evidence is withheld from the programmers seeking access. Put the burden of proof on the party that has the information--the operator. A statutory presumption of cable operators' good faith in leased access negotiations is a sham. Leased access programmers need definite and reasonable rules to promote investment, growth and development in the industry.

Any monetary compensation by leased access programmers to operators, no matter how small (i.e.; one to five cents per subscriber) would make leased access channels substantially *more* remunerative to the operator than any other advertiser-supported standard carriage programmer.

The Center for Media Education and the Consumer Federation of America have submitted evidence to the Commission suggesting that the annual incremental cost to a cable operator of a full-time leased access channel is only \$783. Lacking little or no data from operators to substantiate the costs of providing leased access, the Commission should establish a rate based on the findings of CME and CFA. Cable operators would then have the burden of proving otherwise.

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Public Benefits of Leased Access

Lower rates would contribute to more diversity and the public interest, the core purpose of leased access. The public has forced Congress to focus on the television industry; both parties want the big corporations to pay for using public rights of way (spectrum auctions) and they want better quality TV (the V-chip, indecency provisions). Viewers are demanding more local programming. Yet only 40% of cable systems offer operator-produced local origination (LO) channels and 30% of those consist of automated text bulletin boards. If the MSOs can't improve the quality of programming, small businesses are willing and able to do so.

Leased access programmers are predominately small local businesses. The majority of VIPNA's members are producing (or trying to produce) local programs. These entrepreneurs don't need to chase huge advertising revenues with national broad-based programming. They have the desire and low operating costs to produce niche programming; such as high school sports shows, magazine format and local news features, local tourism highlights, even comedy shows. If the burden of providing leased access was strictly enforced, instead of merely acknowledged, all viewers would benefit from community programming that is far better than the infomercials and pornography that occupy leased access channels today.

Although the FCC is working overtime on new regulations mandated by the 1996 Telecom Act, accommodating leased access does not have to entail additional regulatory burdens for the Commission. Independent mediators could arbitrate disputes and franchising authorities can oversee rate compliance.

Don't wait for the OVS rules to provide an outlet for independent programmers. OVS will take years to become viable and the rules could actually impede unaffiliated programmers in yet unknown ways.

Make leased access work now by:

- tying rates to the real cost of providing leased access;
- requiring cable operators to file their leased access rates with the FCC or franchising authority;
- adopting rules that establish reasonable terms of carriage;
- requiring set-aside channels to be identified now; and
- establishing a maximum time period for dispute resolution.